STATE OF WISCONSIN
SUPREME COURT
No. 2013AP1724

STATE OF WISCONSIN ex rel.
AMAN SINGH,

Petitioner-Appellant-Petitioner,

v.

PAUL KEMPER, Warden,
Racine Correctional Institution,

Respondent-Respondent-Cross-Petitioner.

On Petition for Review of a Decision of the
Court of Appeals, District II
Appeal from the Circuit Court for Racine County
Honorable Gerald P. Ptacek, presiding
Racine County Circuit Court Case No. 2013CV001540

REPLY BRIEF OF PETITIONER-APPELLANT-PETITIONER AMAN SINGH

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INTRODUCTION

The Warden vigorously argues that Wis. Stat. § 973.198 does not violate the *ex post facto* clauses because, he says, it takes no longer to be released under this new statute than it did under former Wis. Stat. § 304.06 (2009-10). Of the many problems with this argument, the principal one is that the Warden is analyzing the *wrong statute* and, thereby, is sidestepping the actual issue that Mr. Singh has presented to the Court.

From the beginning of this case, Mr. Singh has sought release under Wis. Stat. § 302.113(2)(b) (2009-10); not under Wis. Stat. § 304.06(1)(bg)1. Mr. Singh was eligible for positive adjustment time under § 302.113(2)(b) as a non-violent, Class H felon, *see id.*, and he has sought release under that statute since he filed his habeas corpus petition. (R. 1:1, App.025.)

Not only has Mr. Singh sought positive adjustment time under § 302.113(2)(b) throughout this case, but his opening brief in this Court clearly and expressly focused on that section and

explained why release under new § 973.198 takes up to 90 days longer than did release under the former § 302.113(2)(b)&(c). Rather than addressing those arguments, the Warden analyzes an entirely different statute and argues that release under § 973.198 takes no longer than did release under the other statute, § 304.06. So what? Even if the Warden were right about § 304.06, the language in that statute that he relies on was *nowhere to be found* in § 302.113(2)(b).

Section 973.198 *does* delay the release of incarcerated persons who, like Mr. Singh, are eligible for positive adjustment time under § 302.113(2)(b). Therefore, § 973.198 is an unconstitutional *ex post facto* law—at least as to Mr. Singh and those similarly situated. This Court should reverse the Court of Appeals on the issue of the constitutionality of § 973.198.

ARGUMENT

I. SECTION 973.198 IS AN *EX POST FACTO* LAW BECAUSE IT CHANGES THE COURT-REVIEW STANDARD.

Section 973.198 is unconstitutional on a number of grounds. The ground that the Warden addresses first is the fact that the sentencing court applies a different review standard under § 973.198 than it did under the old statute. The essence of the Warden's argument is that "Under either law, the court has *discretion* to release an inmate early or require the inmate to serve the full period of confinement." (Brief at 11) (Emphasis in original). That argument is easily dispatched because "The presence of discretion does not displace the protections of the *Ex Post Facto* Clause . . . ." *Garner v. Jones*, 529 U.S. 244, 253 (2000). The touchstone of the analysis is whether the substantive standard regarding who is eligible for release, applied here by the sentencing court, is the same standard under the new statute as under the old. *See Weaver v. Graham*, 450

U.S. 24, 35 (1981); *Cal. Dep't of Corrections v. Morales*, 514 U.S. 499, 508 (1995).

Section 973.198 does not become a "procedural" statute simply because the Warden calls it "procedural" a dozen times. What matters is how the statute operates. Section 973.198 emphatically does *not* "merely alter[] the *method* for determining whether early release based on PAT would be granted." (*Contra* Brief at 11.) The statute affects "matters of substance," *see Beazell v. Ohio*, 269 U.S. 167, 171 (1925)—namely, the substantive standard governing eligibility for release. Under the plain language of old § 302.113(2)(c)2.b., the sentencing court could consider only (1) the mathematical positive adjustment time calculation, (2) "the inmate's conduct in prison," (3) his evidence-based "risk of reoffending," and (4) the "nature" of his offense. Under the new statute the sentencing court has unfettered discretion; it is not required to hold a hearing and "may" decide to grant a petition or not to do so. Wis. Stat.

§ 973.198. Release may be held up on a whim. This substantive change violates the *ex post facto* clauses.[1]

II. SECTION 973.198 INCREASES PUNISHMENTS BY DELAYING THE DATE WHEN PRISONERS ARE RELEASED.

The principal reason that § 973.198 is an *ex post facto* law is that it increases the time that prisoners must spend in prison when they are eligible for, and entitled to, early release based on the positive adjustment time they have earned. Former section 302.113(2)(b) (2009-10) said that an inmate "shall be released" *when* he had served his confinement sentence less positive adjustment time he had earned.[2] *Id.* The sentencing-court-review process was completed 30

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[1] The Warden does not address the due process implications of § 973.198 that overlap with the *ex post facto* concerns. The Warden asserts only that those arguments are beyond the scope of the Court's grant order. (Brief at 19-20.) They plainly are not. The grant order did not limit briefing to *ex post facto* issues, but instead to whether § 973.198 is "unconstitutional," which covers both the due process and the *ex post facto* issues here.

[2] The Warden suggests that positive adjustment time could be earned only between October 2009 and August 2011. (Brief at 4-6.) While the 2011 Act purported to so limit positive adjustment time, the Court of Appeals held that those who committed crimes or were sentenced between those dates could

days or more before that Eligibility Date, in order to facilitate timely release. Wis. Stat. § 302.113(2)(c). Under current § 973.198(1), the sentencing-court-review process *begins* on that Eligibility Date—"When an inmate . . . has served the confinement portion of his or her sentence less positive adjustment time earned . . . ." This results in a delay of up 90 days. Rather than responding to this argument, the Warden argues that there are few timing changes between former § 973.198 and a *completely different* statute. The Court should not be thrown off the trail by this red herring. The statute that actually applies to Mr. Singh's convictions, § 302.113(2)(b), contains none of the language that the Warden relies on to argue that § 973.198 is constitutional. Analysis of the correct statute shows that § 973.198 is plainly unconstitutional.

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continue to earn positive adjustment time throughout their sentences. The Warden has not challenged that holding as it relates to persons who committed crimes during that time period.

A. Mr. Singh Was Subject to Section 302.113(2)(b) Rather Than Section 304.06(1)(bg)1.

Mr. Singh's sentence for non-violent, Class H felonies (R. 8:13-15, App.42-44, R. 8:20, App.49) made him eligible for § 302.113(2)(b) positive adjustment time. Section 302.113(1) (2009-10) explained who is eligible for early release. That subsection applied to each person "serving a bifurcated sentence imposed under s. 973.01," *id.*; that is, a person sentenced under Truth-in-Sentencing. The second sentence of that section describes Mr. Singh: "An inmate convicted of a misdemeanor or of a Class F to Class I felony that is not a violent offense . . . and who is eligible for positive adjustment time under sub.(2)(b) pursuant to s. 973.01(3d)(b) may be released to extended supervision under sub.(2)(b) or (9h)." Because Mr. Singh committed non-violent, Class H felonies, he was eligible for release under either § 302.113(2)(b) or § 302.113(9h).

The next sentence in § 302.113(1) explains that an entirely different class of people could seek release under the statute the

Warden discusses, § 304.06. That class of inmates committed "violent" felonies or higher-class ("Class C to Class E") felonies, or the Department of Corrections (DOC) formally determined under § 973.01(3d) that they were "ineligible" for § 302.113(2)(b) credit. *See* § 302.113(1).

Because Mr. Singh met the qualifications for § 302.113(2)(b), the positive-adjustment-time procedures of § 304.06(1)(bg)1.[3] never applied to him.[4] The Warden tries to get around this fact by suggesting in a footnote, based on a footnote, that "Singh makes the assertion" that he was eligible for treatment under § 302.113(2)(b) "with no citation to the record, and, indeed, the record is unclear if he was ever determined to be ineligible for PAT under Wis. Stat. § 302.113(2)(b)." (*See* Brief at 12 n.6.)

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[3] He was eligible, based on his Waukesha County conviction, for "75%" release under § 304.06(1)(bg)3. in addition to being entitled to positive adjustment time for that offense.

[4] Inmates were eligible for one section or the other.

The Warden's unfounded assertion is remarkable. Mr. Singh has *always* sought release under § 302.113(2)(b). (*See* R. 1:2-3, App.26-27.) The only way that Mr. Singh could have been ineligible for positive adjustment time under that statute was if the DOC had formally determined that he was likely to reoffend. Wis. Stat. § 973.01(3d)(b). Whether DOC made such determination has always been exclusively within the Warden's knowledge. The Warden does not even now tell the Court that DOC *did* make such a determination, nor has the Warden ever made part of the record any proof that DOC has made such a determination. *See Singh v. Kemper*, 2014 WI App 43, ¶18, 353 Wis. 2d 520, 846 N.W.2d 820 ("nothing in the record or briefing . . . calls this into question"). One wonders, then, why the Warden would suggest to the Court that Mr. Singh might not have been eligible for § 302.113(2)(b). Here, the Warden is either suggesting to the Court something he knows not to be true—*i.e.*, that the DOC determined that Mr. Singh was ineligible—or is

suggesting something that he should have put into the record below but has waived the opportunity to do so. Either way, the Warden cannot exchange the issues raised in this case for a straw man by suggesting that Mr. Singh failed to disprove an inapplicable exception to a rule.

One wonders why the Warden does not, in any event, deign to analyze the statute that Mr. Singh has been relying on and analyzing throughout this litigation. Perhaps the Warden recognizes that his argument falls apart when that correct statute—§ 302.113(2)(b)—is analyzed.

B. The Section 973.198 Procedure Takes 90 Days Longer Than the Section 302.113(2) Procedure Did.

Section 304.06(1) is different in a few respects from § 302.113(2). Even if the Warden's *ex post facto* analysis of § 304.06 were correct, the Warden's § 304.06 arguments still would not apply to § 302.113(2)(b) because the language that the Warden relies on in § 304.06 is entirely absent from § 302.113(2)(b).

For example, the Warden describes the Earned Release Review Commission as a "middle man" between the inmate and the sentencing court. (Brief at 9.) He further points out, as the basis for his argument that there is no delay under the new statute, that an inmate was required to petition the earned release review commission for release, which took, he says, as long as petitioning the sentencing court under the new statute. (Brief at 14.)

But the earned release review commission played *no role whatsoever* under § 302.113(2)(b). Rather, § 302.113(2)(b) provided that "An inmate . . . *shall be released* to extended supervision when he or she *has served the term of confinement* in prison portion of his or her bifurcated sentence . . . *less positive adjustment time* he or she has earned." *Id.* (Emphasis added.) Release under § 302.113(2) was to take place on the Eligibility Date and occurred automatically on that date if the sentencing court chose not to hold a hearing. No "middle man" was involved. Under former § 302.113(2), an inmate was

released to extended supervision directly by DOC. The potential court review of that release began 90 days before he was eligible for release so that he was released on time. *See* §§ 302.113(2)(b) and 302.113(2)(c)1.

The Warden also argues, *see* Brief at 14-16, that under both statutes—*i.e.*, under §§ 304.06 and 973.198—the reviewing body could delay release to extended supervision by up to 30 days after the inmate was eligible to be released. That is irrelevant because neither DOC nor the sentencing court could add 30 days to the sentence under § 302.113(2)(b). Under § 302.113(2)(b)&(c), an inmate was released when he had reached his Eligibility Date, unless the sentencing court had statutory grounds to prevent that release. The Warden does not tell the Court about this distinction in the statutes, and his analysis ignores the plain language of § 302.113(2)(b).

Finally, the Warden argues, *see* Brief at 17-19, that, under the old law as well as under the new, the sentencing court had 60 days

to make its decision. That is true but irrelevant to the argument that Mr. Singh is actually making. The 60-day clock starts ticking a full 90 days later under § 973.198 than it did under the § 302.113(2) framework. Under § 302.113(2), the sentencing court received notice 90 days *before* the inmate was eligible to be released, and that is when the 60-day clock started ticking. Wis. Stat. § 302.113(2)(c)1. Under § 973.198, the 60-day clock does not start ticking until an inmate petitions the sentencing court, which cannot happen until he is already eligible for release. § 973.198(1) and (3). As a result, an inmate is imprisoned for up to 90 days longer under the new statute than he was under the old statute. Therefore, the changes from release under § 302.113(2)(b) to § 973.198 are unconstitutional, because they delay release by up to 90 days, which is an *ex post facto* increase in punishment.

The Court of Appeals must, therefore, be reversed.[5]

CONCLUSION

For the reasons set forth in this brief and Mr. Singh's opening brief, this Court should declare § 973.198 unconstitutional for prisoners eligible for release under § 302.113(2)(b). The Court should remand this case with instructions that the circuit court issue the writ of habeas corpus and determine whether further equitable

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[5] The change from § 304.06 to § 973.198 presents its own *ex post facto* problems and the Court should be careful not to suggest in its opinion that § 973.198 is constitutional in any respect.

The Warden's proposed reading of § 304.06 renders several clauses in the statute superfluous. *See Marotz v. Hallman*, 2007 WI 89, ¶18, 302 Wis. 2d 428, 734 N.W.2d 411. For example, his interpretation fails to grapple with § 304.06(1)(bk)1., which provided that court review began "within 90 days *of release*." (Emphasis added.) His interpretation also fails to address the syntax of § 304.06(1)(bg), which suggests that an inmate could file a petition so that he was *released* when he had served his confinement sentence less positive adjustment time. The Warden advocates for an interpretation of the statute as if it said "a person may, when he or she has served the term of confinement in prison portion of his or her bifurcated sentence less positive adjustment time her or she has earned, petition the earned release review commission for release to extended supervision."

Finally, the potential 30-day delay in release that the Warden discusses (Brief at 15-16), which exists only in § 304.06 and not in § 302.113(2)(b), does not change the analysis of whether § 973.198 is constitutional even as to § 304.06. Adding 60 extra days of imprisonment is just as unconstitutional as adding 90.

relief is warranted. The Warden suggests that no additional relief is available to Mr. Singh because he has been released from prison. (Brief at 20.) But as Mr. Singh pointed out in his opening brief, habeas is an equitable remedy that is not limited to release from prison. Mr. Singh remains in the custody of DOC, serving the extended supervision portion of his sentence. *See* Wis. Stat. § 302.113(8m). The circuit court could fashion any number of equitable remedies for Mr. Singh's unconstitutionally lengthened sentence. Whether and how to exercise equitable discretion is best left to the circuit court in the first instance.

Dated: February 25, 2016

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CERTIFICATION OF FORM, LENGTH AND ELECTRONIC FILING

I hereby certify that this reply brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b)&(c) for a brief produced with a proportional serif font. The length of this brief is 2,588 words.

I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date, except for the signature.

Dated: February 25, 2016

Philip C. Babler

CERTIFICATE OF MAILING

I hereby certify that on February 25, 2016 I caused the foregoing Reply Brief of Petitioner-Appellant-Petitioner Aman Singh and 22 copies to be sent by Federal Express for delivery to the clerk, and therefore, filed on this date, pursuant to Wis. Stat. § 809.80(3)(b)(2).

Dated: February 25, 2016

Philip C. Babler